THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.

ST. LOUIS, THURSDAY, APRIL 9, 1874.

SUBSCRIPTION:
$3 PER ANNUM, in Advance

Effect of War upon the Contract of Life Insurance—Decision by the Supreme Court of the United States.

We had occasion some time since, in a note to Smith v. Charter Oak Life Ins. Co. (*ante*, pp. 79 *et seq.*), to go over the cases on this subject pretty thoroughly. Among the cases mentioned in that note were two in which the question had been determined in federal courts of first instance, namely, Hamilton v. New York Mutual Life Ins. Co., 9 Blatchford, 234, in which it was held by BLATCHFORD, J., in the United States District Court at New York City, that the war merely suspends but does not invalidate such contracts, and Tait v. New York Life Ins. Co., determined by Judge EMMONS in the United States Circuit Court at Memphis, Tennessee, in which the contrary principle is asserted. These two cases were taken to the Supreme Court of the United States, where the questions involved in them have recently been argued at great length; and the result is, that both decisions are affirmed by a divided court. Thus, the anomalous result is produced of affirming two decisions substantially the same in their facts, and precisely opposite in their conclusions upon those facts. What is right before Judge BLATCHFORD is wrong before Judge EMMONS, and *vice versa;* while the life insurance companies and their Southern policy-holders are left in the same state of perplexity as before. It is thought, however, that a way out of this wilderness may be found in the fact that the Chief Justice did not sit in these cases, and that a re-hearing will be granted in which he will take part, when his views will be decisive of the question.

Iron Mountain Railroad Tax Case—Exemption from Taxation by Legislative Contract.

We publish in this number the opinion of the Supreme Court of the United States, delivered by Mr. Justice FIELD, in the Iron Mountain Railroad tax case. It is a case of great interest and importance to the state of Missouri. The Iron Mountain company asserted a perpetual exemption from taxation by virtue of an irrepealable legislative contract granting this immunity to the prior company by that name, to whose rights the present company claimed to have succeeded. It will be observed that the court decide that the first company did possess the exemption. It will also be observed that the court say that the legislature, in 1867, undertook to transfer this exemption or immunity to the present company as an unextinguished or unmerged franchise. But the court hold that the exemption from taxation in favor of the original company ceased when the state foreclosed its lien, under the act of 1866, and purchased the property. Mr. Justice FIELD puts the point clearly. He says: "When the state became the purchaser the immunity ceased; the property stood in its hands precisely the same as any other unencumbered property of the state, exempt from taxation, not by virtue of any previous stipulation with the company, but as all property of the state is thus exempt."

Under the view of the Supreme Court, nothing but the provision of the new constitution of 1865 (art. 11, sec. 16), which wisely prohibited future legislative exemptions from taxation, prevented the Iron Mountain company from being perpetually exempt from taxation. Other companies in the state claiming a similar exemption have taken a deep interest in the Iron Mountain case, for which reason, as well as for the public interest in the controversy, we publish at this early day the full text of the opinion of the Supreme Court.

Railway Negligence—Killing Child of Tender Years—Negligence of Parent in Suffering Child to be at Large.

In Philadelphia and Reading Railroad Company v. Long (Legal Chronicle; s. c., 4 Pittsburgh Law Jour. N. S. 122), determined in the Supreme Court of Pennsylvania, Feb. 24th, a child two years and two months old ran upon the defendant's track, where it passes through the populous town of Manayunk, and was killed by a train which was running at the rate of eight miles an hour. The court below, among other things, instructed the jury that "the fact that the child is found in the streets affords a strong presumption of negligence on the part of the plaintiffs. You will therefore consider whether the mother took *reasonable care* of the child; if she did not, it was negligence."

Commenting upon this instruction, AGNEW, Ch. J., said: "To *suffer* a child to wander on the street has the sense of *permit*. If such permission or sufferance exists, it is negligence. This is the assertion of a principle. But whether the mother did suffer the child to wander is a matter of fact, and is the subject of evidence, and this must depend upon the care she took of her child. Such care must be *reasonable* care, dependent on the circumstances. This is a fact for the jury. If she did not exercise this care she was negligent. What more than this can be demanded of her? When a railroad runs through a populous city has the company a right to exact a harder measure, and are we to say, as a matter of law, that the citizens are to be imprisoned in their houses, or their children caged like birds, otherwise it is negligence? Is it negligence for the poor who congregate these crowded streets, unless, even in the summer's heat, they live shut up in the noisome vapors of their closed tenements, without a breath of healthy air? Is this the life they must lead, or be adjudged to be negligent? This mother gave her child a piece of bread to satisfy it, closed the kitchen door to keep it in, and went to the next room to scrub the oil-cloth on the floor, and before her labor was finished, and in less than five minutes, the mangled body of her little one was brought in and laid before her. We have no reason to believe that her love for her child was less than that of the more favored of her sex, having servants at their beck. Because the child managed to lift the latch and momentarily disappeared, are we to say that this was negligence *per se*, and that she *suffered* her child to wander into the street? What sort of justice is that which tells the mother agonizing over her dying child, '*Your* negligence caused this. You suffered your child to run into the jaws of death; we can not perceive any fault in the railroad company; a speed of eight miles an hour along this populous thoroughfare was all

right.' We can endorse no such cruel doctrine; but we must say, as was said in Kay v. Railroad Co., that the doctrine which imputes negligence to a parent in such a case is repulsive to our natural instincts, and repugnant to the condition of that class of persons who have to maintain life by daily toil. 15 P. F. Smith, 276."

This case is but one of several which have been before the Supreme Court of Pennsylvania, involving the same question: Kay v. Penn. R. R. Co., 65 Penn. State, 269; Smith v. O'Connor, 48 Penn. State, 218; Philadelphia and Reading R. R. Co. v. Spearen, 47 Penn. State, 300; Rauch v. Lloyd, 31 Penn. State, 358; Pennsylvania R. R. Co. v. Kelly, ibid, 372. The subject is fruitful of nice distinctions, and the decisions, whether in this country or in England, are by no means uniform. In Ihl v. The Railway Co., 47 N. Y. 317, it was held that sending a child a little more than three years old across the track of a street railroad, attended only by another child nine and one-half years old, was not necessarily such negligence on the part of the parents as would defeat a recovery in an action brought by the child's administrator against the railroad company for damages for causing its death by negligently running over it while crossing the track. The court say (RAPALLO, J.) that all the cases in which the negligence of parents or custodians of infants not *sui juris*, is held to preclude a recovery by such infants or their representatives, necessarily assume that the conduct of the infant was such as would, in the case of a person *sui juris*, have amounted to contributory negligence, and hold that the negligence of the parent or the custodiant, but not the personal conduct of the infant, constitutes the bar. The law in such cases makes the infant responsible through others. (Hartfield v. Roper, 21 Wend. 615, 619.) The conduct of the infant may have an important bearing on the question of the defendant's negligence; but when the latter is clearly negligent, contributory personal negligence on the part of an infant obviously not *sui juris* can not be alleged, unless negligence on the part of his guardian or custodian has brought about the situation, or in some manner contributed to the injury. (Mangam v. Brooklyn Railroad Co., 38 N. Y. 460, 461.)

Law of Homicide—Character of the Slain for Violence.

We cheerfully give place in another column to a communication from Thomas G. Jones, Esq., Reporter of the Supreme Court of Alabama, in which he criticises an article which appeared in this journal for January 15th, wherein we took occasion to examine the case of Fields v. The State, 47 Ala. 603. We do this the more readily when we consider that our article was a criticism upon the performance of a judge, who from the nature of his position is himself precluded from making a reply. For this reason we recognize the rule that when a writer in a legal or other publication feels called upon to criticise an adjudicated case, he should proceed with great caution and candor. We may therefore be permitted to say, in vindication of our own good faith in making that criticism, that it was not written until we had thoroughly studied every case which it is believed the American books contain upon the subject of the admission of evidence of the character of the deceased in trials for homicide. This examination of cases convinced us so clearly that Fields' case embodies an extraordinary ruling upon this question and gives extraordinary reasons for such ruling, that we felt obliged to couch our dissent in clear language, and not to overwhelm the subject with doubts and conjectures such as serve only to perplex and task the patience of the reader.

The juncture of circumstances which warrants the admission of such evidence in trials for homicide has nowhere been more clearly defined than by the Supreme Court of Alabama in earlier cases. Thus, it was said in Quesenberry v. State, 3 Stew. & Port. 308, that "if the killing took place under circumstances that could afford the slayer no reasonable grounds to believe himself in peril, he could *derive no advantage* from the general character of the deceased for turbulence and revenge. But if the killing were such as to leave any doubt whether he had been more actuated by the principle of self-preservation than that of malice, it would be proper to admit any testimony calculated to illustrate to the jury the motive by which he had been actuated." So it is said in Pritchett v. The State, 22 Ala. 39, that "an act performed by a quick, impulsive, bloodthirsty, abandoned man may afford much stronger evidence that the life of the party assailed was in imminent peril than if performed by one known to possess an entirely different character and disposition, and might very reasonably justify a resort to more prompt measures of self-preservation." Again, in Franklin v. The State, 29 Ala. 14, the court say: "To avoid detriment in the practical application of the rule, it must be understood neither, on the one hand, to excuse the taking of one's life because he is a bad man, nor, on the other, to be limited to those cases where the facts are such as to make it doubtful whether the homicide was committed *se defendendo. The law can not apportion the criminality of the homicide to the character of the deceased*, and it can not confine the rule to cases of doubt, because, in such cases, the defendant is entitled to an acquittal; and therefore, so to limit it would be to deny to it all practical effect. When the conduct of the deceased, although in itself innocent, is such that, illustrated by his character, its tendency is to excite a reasonable belief of imminent peril, the evidence ought to be admitted, and the question of its effect left to the determination of the jury. It will be for the court to determine, in every case, whether the facts are such as will justify the admission of the evidence." In all of these cases it was held proper, under the facts in proof, to exclude such evidence.

How different the juncture of facts indicated by the above language is from that in Fields' case, the reader has only to glance at that case to perceive. In that case there was, according to the report, no pretence that the killing was done "from a principle of self-preservation;" but, instead of this, the defendant prepared a weapon for the occasion, and for the purpose of avenging an insult which had occured six hours before, deliberately shot and killed the deceased, who was going his own lawful way, peaceably and unarmed, and afterwards declared that he had killed him to avenge the insult. He had "shot the d—d devil, and would kill any man who would charge him with burning his gin-house and call him a thief."

We are willing to concede what we understand our correspondent to argue, that the ground on which the court in Fields' case held this evidence ought to be admitted was not for the purpose of guiding the jury in fixing the technical *degree* of the crime, but for the purpose of guiding them in

the exercise of the *discretion*, which the law had reposed in them within certain limits, of fixing the *quantum* of punishment. We are willing to concede this, since it is urged by our correspondent, although it involves the court in the nonsense of reversing a judgment for the purpose of admitting evidence to guide the jury in doing what they had already done; for they had already fixed the punishment of the accused at the lowest limit allowed by law for the degree of crime of which they found him guilty. Conceding, then, this to be the ground of the ruling on this point, what result does it necessarily involve? It necessarily involves the conclusion—and this seems to us the doctrine which, under this view, the case necessarily decides—that where a man deliberately kills another out of revenge for a previous insult, if it turns out that the "general character of the deceased for turbulence, violence, bloodshed and recklessness of human life" was bad, the slayer ought not to be punished as severely as though the general character of the slain in these particulars was good. We can not see but that this result is substantially the same as that stated by us in our previous observations upon this case. Mr. WHARTON says—and his language has been many times quoted by judges with approbation—that "it would be a barbarous thing for A. to give as a reason for killing B., that B.'s disposition was savage and riotous." 1 Whart. Crim. Law, 7th ed., § 641. We think it would be equally barbarous to allow a man who has deliberately killed another out of revenge to urge *in mitigation of his punishment* that the deceased was a man of "general bad character for turbulence, violence, bloodshed and recklessness of human life." Such a man, until he is convicted of crime, is entitled to the same measure of protection before the law as the best or most exemplary citizen; and any rule of law which punishes the murderer of such a man less severely than the murderer of a good man, makes him unequal with the latter before the law, in respect of the right to live, and correspondingly diminishes that protection which the laws of his country promise to every citizen, without respect of persons.

But we apprehend that every judge and criminal practitioner is aware that questions of this kind are generally sprung as mere devices to excite the sympathies of ignorant jurors and to distract their attention from the real issues of the case. In England and in some of the American states where the rights of society in criminal trials are guarded, and where judges are accustomed to hold juries well in hand, we apprehend that no advocate of repute would attempt to get in such testimony under the circumstances of Fields' case. But where an unchecked rein is given to the advocate, he is never wanting in devices to perplex the judgment and excite the emotional nature of the ignorant and weak juror. He plays upon him as he would upon a musical instrument, and brings forth any desired sound. "Govern the ventages with your fingers and thumb; give it breath with your mouth, and it will discourse most eloquent music."

We may be permitted to note, in conclusion, that in running over the 47th volume of Alabama Reports a second time, we find in it no less than *ten* murder cases. Of these, one comes up on a point of practice—a motion for a discontinuance. The other nine are appealed from judgments of conviction of felonious homicide in some of its degrees; and of these nine, *eight* are *reversed*. We shall not undertake to draw any inference from this fact. At this distance we could not justly do so. It would seem, however, to argue most forcibly that where such a state of things exists, the barriers which the common law has erected for the safety of society should be by the courts vigiantly guarded and preserved.

Upon the second point adverted to by our correspondent, we cheerfully concede, upon a re-examination of the case, that the language of the learned Chief Justice that the "circumstances of the killing should be viewed in connection with the good or bad character of both the *defendant* or the deceased," probably had reference to the circumstance of the particular case, the good character of the deceased having been put in evidence; although this remark was not made in connection with that part of the opinion which discusses the error of the court below in charging upon evidence of the good character of the defendant.

The Validity of Exemption Laws which Operate upon Existing Contracts.

We publish elsewhere a brief opinion of the Supreme Court of South Carolina in the case of Cochran v. Darcy, the importance of which consists in the threefold fact that it reverses a well-considered decision of the same court in the case of *Re* Kennedy, 2 South Car. N. S. 216; that it interprets the decision of the Supreme Court of the United States in Gunn v. Barry, 15 Wall. 610, as going to the extent of holding that exemption laws which operate upon contracts in existence at the time of their passage are void; and that, in following this interpretation of that case, it runs counter to the weight of adjudications in other states.

With respect to Gunn v. Barry, there seems to be room to question whether it goes to the extent of holding that exemption laws which operate retroactively upon contracts in existence at the time of their passage are to that extent unconstitutional and void. It does hold that where a person has obtained a judgment, which by the law of the state is a *lien* upon the realty of the judgment debtor, a homestead law enacted subsequently to the rendition of such judgment and before the levy of execution, which seeks to discharge the debtor's property from such lien, is so far unconstitutional and void, and does not abridge the jurisdiction of the state courts to afford the judgment creditor satisfaction out of such property. This was the precise point in judgment, and this is what the learned reporter, in writing his head-note to the case, manifestly understood to be the scope of the question decided. But while this is true, it is possible that Mr. Justice SWAYNE, in pronouncing the opinion of the court, used language strong enough to warrant the deduction which the Supreme Court of South Carolina make as to what the case decides. He says: "The effect of the act in question, *under the circumstances of this judgment*, does not merely impair, it annihilates the remedy. There is none left. But it reaches still further. It withdraws the land from the lien of the judgment, and thus destroys a vested right of property which the creditor had acquired in the pursuit of the remedy to which he was entitled by the law as it stood when the judgment was recovered. It is, in effect, taking one person's property and giving it to another without compensation. This is contrary to reason and justice and to the fundamental principles of the social compact. * * * The legal remedies for the enforcement of a contract, which belong to it at the time and place where it is made, are a part of its obligation. A state may change them,

provided the change involve no impairment of a substantia right. If the provisions of the constitution or the legislative act of a state fall within the category last mentioned, they are to that extent utterly void. They are, for all the purposes of the contract they impair, as if they had never existed. The constitutional provision and statute here in question are clearly within that category, and are therefore void."

If from this language, taken in connection with the facts of the case, Gunn v. Barry is to be understood as deciding that homestead laws which by their terms operate upon contracts in existence at the time of their passage, are, so far as they thus operate retroactively, void, without reference to the question whether a judgment lien has attached to the property prior to the passage of the exemption law, it is contrary to the understanding of several of the earlier judges of the same court, as expressed in *dicta* which have been quoted and relied on by the state courts in numerous instances. Thus, in Bronson v. Kinzie, 1 How. 311, 318, Chief Justice TANEY said: "A state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. * * * It may, if it think proper, direct that the necessary implements of agriculture, or the tools of a mechanic, or articles of necessity and household furniture, shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not by every sovereignty according to its own views of policy and humanity. It must reside in every state to enable it to secure its own citizens from unjust and harassing litigation and to protect them in those pursuits which are necessary to the existence and well-being of every community. And although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts less tardy and difficult, yet it will not follow that the law is unconstitutional." In the later case of The Planters' Bank v. Sharp, 6 How. 301, 330, Mr. Justice WOODBURY enumerates laws exempting tools or household goods from seizure as an example of legislation respecting the remedy which might be applied to existing contracts. And so in Ogden v. Saunders, 12 Wheat. 213, 291, Mr. Justice JOHNSON says that "it is equally the duty and right of governments to impose limits to the avarice and tyranny of individuals, so as not to suffer oppression to be exercised under the semblance of right and justice."

The same views have been taken by the courts of last resort in several of the states. Bigelow v. Pritchard, 21 Pick. 169; Rockwell v. Hubbell, 2 Doug. (Mich.) 197; Morse v. Goold, 11 N. Y. 281 (overruling Quackenbush v. Danks, 1 Denio, 128, 3 Denio, 594, and 1 N. Y. 129); Cusic v. Douglas, 3 Kansas, 123; Maxey v. Loyal, 38 Ga. 531; Hardiman v. Downer, 39 Ga. 425; Hill v. Kessler, 63 N. C. 437; Farley v. Dowe, 45 Ala. 324; Sneider v. Heidelberger, ibid, 126; Stephenson v. Osborn, 41 Miss. 119. In the case in Alabama the exemption law of that state (Code of Ala., § 2955) is held to be retroactive and to divest the lien of an attachment levied before its passage, but is, nevertheless, held to be constitutional and valid. Sneider v. Heidelberger, *supra*. The Court of Appeals of Virginia, however, has, in a recent exhaustive opinion by CHRISTIAN, J., in which all the judges concur, decided that the provision in the constitution of that state and the act of the general assembly passed in pursuance thereof, known as the homestead exemption law, so far as they apply to contracts entered into or debts contracted before their adoption, are in violation of the constitution of the United States, and therefore void. The Homestead Cases, 22 Grattan, 266. And the same conclusion appears to have been reached in Kentucky with reference to an exemption law of that state, in Kibbey v. Jones, 7 Bush, 243.

Some of the cases, however, which affirm the validity of the retroactive features of such laws, contain language limiting the legislative power to the enacting of exemption laws which are *reasonable*, and which go no farther than to make an exemption consistent with the humane grounds of public policy in pursuance of which such enactments are sustained. Thus, in Stephenson v. Osborne, 41 Miss. 119, 130, ELLET, J., delivering the opinion of the court, said: "The legislature exercises this power according to its own views of humanity and sound policy. But it is not without its proper limit, and it may be abused. Every party is entitled to an adequate and available remedy for the enforcement of his contract, and any legislation which impairs the value and benefit of the contract, though professing to act on its remedy, would impair its obligation. It is not competent for the legislature, under color of an exemption law, so to obstruct the remedy upon contracts as to render it nugatory or impracticable. An abuse of the legislative discretion in this respect would demand the interposition of the court. We do not undertake to intimate what would amount to such abuse; such a question would be one of great delicacy and difficulty. We only mean to say that the power of the legislature over this subject is not unrestricted by the constitution, and that cases may arise in which it will be the duty of the judiciary to arrest its exercise." So in the case in Kansas, the court say, per CROZIER, Ch. J.: "It must not be inferred that a state is omnipotent upon this subject, and that if it can fix the amount at one acre in a town, it may increase it to ten or twenty acres, and in a like proportion in the country. Its action will not be constitutional if it be apparent that its object was not so much to secure the well-being of the citizens as to enable them to hold large amounts of property with a view of making it available to their own aggrandizement for other purposes than that of homesteads. The state is the sole judge of the proper extent of the exemptions within the limits above indicated; and so long as the extent of the exemption shall be in accordance with sound policy and humanity, and no greater than shall be reasonably necessary to protect the citizens in their pursuits necessary to their existence and well-being, its action must be sustained, although it may here and there work an individual hardship." Cusic v. Douglas, *supra*. So in *Re* Kennedy, *supra*, the court (WILLARD, J.) assert that "it is within the power of the state to exempt the lands and personal property of a debtor, *to a limited amount*, from liability on account of an existing indebtedness, so long as such exemption does not, in effect and intention, impair the obligation of such contract."

For the opinion in Cochran v. Darcy, which we elsewhere publish, we are indebted to William Stone, Esq., counsellor at law, of Charleston, South Carolina.

—JUDGE R. B. WARDEN, one of the biographers of Chief Justice Chase, threatens to sue the Cincinnati Commercial for libel, on account of some criticism of his conduct by that journal in connection with the use made by him of certain papers of Chief Justice Chase.

Legislative Exemption of Railway Property from Taxation—The Iron Mountain Railroad Case.

SPENCER TRASK v. CONSTANTINE MAGUIRE, THE ST. LOUIS AND IRON MOUNTAIN RAILROAD COMPANY, THOMAS ALLEN, S. H. LAFLIN, G. B. ALLEN, SAMUEL COPP, S. GANDY, A. TRASK, AND H. G. MARQUAND.

Supreme Court of the United States, No. 106, *October Term*, 1873.

1. **Iron Mountain Railroad—Exemption from Taxation**—The property of the *present* Iron Mountain Railroad Company, created in 1867, is not exempt from the power of state taxation; but it was otherwise as to the property of the first corporation by that name, created in 1851.

2. ——. ——. **When the Exemption ceased**—The exemption in favor of the original company from taxation ceased when the state foreclosed its statutory mortgage or lien, under the act of February 19, 1866, and purchased the property.

3. ——. ——. **New Constitution of Missouri.—Effect of its Prohibition against Exemptions from Taxation.**—In July, 1865, the new constitution of Missouri went into effect, by which (art 11, sec. 16) the legislature is absolutely prohibited to grant to railroad companies an immunity from taxation; and under this prohibition the legislature, although it undertook to confer upon the present company all the immunity from taxation which the old company enjoyed, had no power to do so.

Appeal from the Circuit Court of the United States for the Districts of Missouri. A brief report of the case in the court below will be found in 2 Dillon C. C. R. 182, note.

Mr. Rombauer, for the collector; *Messrs. Dryden & Dryden*, for the Iron Mountain Railroad Company.

Mr. Justice FIELD delivered the opinion of the court.

The question presented for our determination in this case is, whether the property of the present St. Louis and Iron Mountain Railroad Company, a corporation created under the laws of Missouri, is, by an irrepealable legislative grant, forever exempted from all state and county taxes. Two corporations bearing that name have existed in Missouri, the second succeeding the first in the possession and ownership of its road and property. The first was created by an act of the legislature of the state, passed in March, 1851; the second was formed in July, 1867, under an act of the previous year authorizing the incorporation of the purchaser or purchasers of any railroad, or any part, section, or branch thereof, which had previously been, or might thereafter be, forfeited to or sold by the state.

The property of the first corporation was undoubtedly exempt from state and county taxes. The act of incorporation adopted as part of it a provision of another act, which declared in terms that the stock of the company should be thus exempt. (Laws of Missouri of 1851, p. 479.) It is true that at this time a statute was in existence, passed in 1845, which declared that the charter of every corporation subsequently granted should be subject to alteration, suspension, and repeal at the discretion of the legislature. But from the operation of this provision the company was expressly exempted by an act amendatory of its charter, passed in 1853. (Laws of Missouri, of 1853, p. 296.) From that time at least the exemption of its stock from state and county taxation was placed beyond legislative interference. The amendatory act also declared that all the engines, cars, wagons, machines, and other property belonging to the company should be deemed a part of its capital stock, and be vested in its respective shareholders, according to their respective shares. All the property of the company was thus placed within the exemption which attached to the original stock; that designated was to be deemed a part of such stock, as well as that originally embraced by this term.

On the argument some attempt was made from the use of the term *stock* in the original act, and the language of the amendatory act that the property should be vested in the respective shareholders, according to their respective shares, to establish the position that the exemption extended only to the separate shares of the individual stockholders. But the argument does not strike us as possessing much force. The terms "stock of the company" imported the capital stock of such company, the subscribed fund which the company held, as distinguished from the separate interests of the individual stockholders. The language of the amendatory act did not qualify this meaning; that only declared that other property of the company should also be deemed capital stock, and the additional provision that it should be vested in the respective shareholders, according to their respective shares, only meant that they should have the interest of shareholders in the property, according to their respective shares.

The corporation in question was created to constuct a railroad from a point in the city of St. Louis to the Iron Mountain and Pilot Knob, in Missouri, with liberty to extend the road to the Mississippi river, or to the southern part of the state. The road was constructed from St. Louis to Pilot Knob, a distance of about eighty-seven miles, with a branch to Potosi. During the progress of the work, and in order to aid in its construction, the legislature of the state, previous to 1860, passed various acts providing for the loan of the bonds of the state to the company. All the acts referred for the terms of the loans to an act passed in 1851 to expedite the construction of the Pacific railroad and of the Hannibal and St. Joseph railroad. (Laws of Missouri of 1851, p. 267.) That act provided that no part of the bonds should be delivered to the company until it signified its acceptance of them to the secretary of state, by filing in his office a certificate of such acceptance under the corporate seal of the company and the signature of its president; that such acceptance should be recorded, and upon its record should become to all intents and purposes a mortgage of the road of the company, and every part and section thereof, and its appurtenances, to the people of the state, to secure the payment of the principal and interest of the bonds. That act authorized the governor, in case default was made in the payment of either the interest or principal of the bonds, to sell the road and its appurtenances at auction to the highest bidder, or to buy in the same at such sale for the use and benefit of the state, subject to such disposition in respect to the road or its proceeds as the legislature might thereafter direct.

Under the different acts, bonds of the state to a large amount were issued to the company; its acceptance of them in proper form was given to the secretary of state, and the acceptance was duly recorded, and from the date of such record the state acquired, for the payment of the principal and interest of the bonds, a lien upon the road and every part and section thereof and its appurtenances.

The company failed to pay the interest on these bonds. It does not appear for how long a period the company was thus in default, nor is this material. It is sufficient to say that in 1865 the right of the state, under the provisions of the acts cited, to interfere and sell the property, had become complete. Before a sale, however, was made the legislature passed another act for the sale of this and other railroads by the govenor, and the foreclosure of the state lien thereon. This act, which was approved in February, 1866, among other things required the governor to advertise for sale the different railroads, with their appurtenances, rolling stock, and property of every description, and all the rights and franchises thereto belonging; and to sell the same at auction to the highest bidder, in pursuance of the several acts creating a lien thereon. It also provided for the appointment of three commissioners to attend the sale of the different roads as advertised, and to bid in the same for the use and benefit of the state for an amount not exceeding the respective liens thereon; and in case the roads were struck off and sold to them, to take possession of and hold the same, with their appurtenances and property, and again, after due advertisement, inviting proposals for the purchase of the different roads, their lands, appurtenances, and franchises, to resell the same. Under this act the St. Louis and Iron Mountain railroad was advertised for sale, with its rights and privileges, and at the sale was bid in by the commissioners for the state. However

broad the terms of the advertisement, the interest sold could not extend beyond the property upon which the state at the time held a lien, and this was the entire road of the company and its appurtenances. But as the property was sold to the state, it is unnecessary to determine whether, if the sale had been made to a third party, the immunity from taxation possessed by the company would have passed to the purchaser. When the state became the purchaser the immunity ceased; the property stood in its hands precisely the same as any other unencumbered property of the state, exempt from taxation, not by any virtue of any previous stipulation with the company, but as all property of the state is thus exempt. Subsequently the road and its appurtenances, and all the franchises, which, under the new constitution of Missouri, adopted in 1865, were transferable by the state, were sold by the commissioners to McKay, Vogel and Simmons, who conveyed the same to Thomas Allen, who with others, in July, 1867, became incorporated under the name of the St. Louis and Iron Mountain Railroad Company. That company is still in existence, and is one of the defendants herein. To it Allen transferred all the rights and privileges acquired by him from his vendors, and all of which they acquired from the state. The acts under which the sale was made provided that purchasers of the road should have all the rights, franchises, privileges, and immunities which were enjoyed by the defaulting company under its charter and laws amendatory thereof, subject to the limitations and conditions therein contained, and not inconsistent with the act authorizing the sale. The new company thus acquired all the immunity from taxation which the original company originally possessed, if it were competent for the legislature at the time, under the new constitution, to confer this privilege. The question, therefore, is whether the legislature was competent to grant the immunity claimed, under that constitution, which went into operation on the 4th of July, 1865, previous to the passage of any of the acts authorizing the proceedings under which the new company acquired its rights.

The 16th section of the 11th article of that instrument provides that "no property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools and such as may belong to the United States, to this state, to counties, or to municipal corporations within this state;" and the 27th section of the 4th article declares that "the general assembly shall not pass special laws * * * exempting any property of any named person or corporation from taxation."

These provisions require no explanation; they are absolute prohibitions against the grant of any new immunity from taxation, unless railroad companies of the state existing at the time are excepted from their operation. Such exception is claimed under the "Ordinance for the payment of state and railroad indebtedness" which accompanied the constitution and was adopted with it. That ordinance first provides for the levy and collection from different railroads, and among others from the St. Louis and Iron Mountain Railroad Company, an annual tax of ten per cent. on all their gross receipts for the transportation of freight or passengers (not including amounts received from and taxes paid to the United States) from the first of October, 1866, to the first of October, 1868, and fifteen per cent. thereafter; and then enacts that the tax shall be collected from the companies only for the payment of the principal and interest on the bonds of the state issued for their benefit, or on bonds guaranteed by the state; that if any of the companies refuse or neglect to pay the tax thus required, and the principal or interest of any of the bonds, or any part thereof, remain due and unpaid, the general assembly shall provide by law for the sale of the railroad and other property and the franchises of such company under the lien reserved to the state; and that whenever the state becomes the purchaser of any railroad or other property, or the franchises thus sold, the general assembly shall provide by law in what manner the same shall be sold for the payment of the indebtedness of the company; that no railroad, or other property or franchises purchased by the state, shall be restored to the defaulting company until it shall have first paid the interest due from it, and that no sale or other disposition of any such railroad or other property, or its franchises, shall be made without reserving a lien upon the property and franchises thus sold or disposed of for all sums remaining unpaid.

Now, the argument of the appellants is that as the ordinance authorizes the legislature to provide for the sale of the franchises of a defaulting corporation, it can transfer under that designation immunity from taxation, if the company ever possessed such immunity; and that this was the effect of the sale of the St. Louis and Iron Mountain railroad and its franchises to McKay, Vogel and Simmons. And authority for this position is supposed to be found in the answers given by the judges of the Supreme Court of Missouri, in November, 1865, to certain questions propounded by the governor under a provision of the constitution authorizing him to take their opinion on important questions of constitutional law. The questions propounded were substantially these:

1st. Whether the provisions of the ordinance operated to suspend the right of the state to sell the roads named, or either of them, until there was a refusal or neglect to pay the tax imposed by the ordinance; or whether the state might order the sale of the railroads, or either of them, prior to such refusal or neglect;

2d. If the judges were of opinion that a sale of the railroads might be ordered before such refusal or neglect, whether such sale could be made "without reserving a lien upon all the property and franchises thus sold for all sums remaining unpaid," or, in other words, whether this clause constituted a condition of *all* sales of railroads ordered by the state, or referred only to sales made under the ordinance for refusal and neglect to pay the tax;

3d. If the judges should be of opinion that all sales of railroads by authority of the state were subject to the restriction mentioned, whether the words "all sums remaining unpaid" referred to the sums for which the railroad sold was in default, or to that portion of the purchase money not paid in cash at the time of sale; and

4th. Whether upon a sale of a railroad under a lien of the state the constitution authorized the state to receive, in payment of the purchase money, preferred or other shares of stock issued by a corporation purchasing the road.

None of these questions, as will be perceived, call for any opinion as to the effect of the sale of the franchises of a road, or the meaning of that term. They call only for an opinion upon the power of the legislature to order a sale of the roads, the liens to be reserved, the payments to be made, and the right to receive shares of stock of a purchasing corporation. The answer of the judges stated that the 5th section of the ordinance related to all sales of railroads, whether in default for not paying the interest on the bonds of the state or not paying the tax levied; that when the state had become the purchaser of any railroad sold under the lien of the state, the general assembly could provide in what manner such railroad could again be sold for the payment of the indebtedness which the state had incurred on account of bonds loaned to it or guaranteed for its benefit; that it would have had this power without the aid of the ordinance, but that no sale or other disposition of any such railroad, or other property, could be made by the state without reserving a lien upon the property sold for all sums remaining unpaid, and that the purchaser was required to make all payments therefor in money or in bonds or other obligations of the state; and then adds that the "legislature is left unrestricted further as to the time, terms and conditions of the sale." This language is supposed to determine that in the sale of such property the legislature is not bound by the provisions of the constitution we have cited.

But we do not think the language used justifies any such conclusion, but was rather intended to indicate that the ordinance imposes no other restrictions than those designated, and has no reference whatever to the clauses of the constitution in respect to which no opinion was asked.

It seems to us that the plain meaning of the ordinance, when it says that the general assembly shall provide by law in what manner the railroad and its franchises may be sold, is that they shall be sold in conformity with such law as the legislature may constitutionally pass, not by any law which it could devise if it had unlimited discretion in the matter. It would conflict with well-settled rules of construction to hold that the language used authorizes any legislation regardless of the provisions of the constitution. And there is nothing in the authority conferred to provide for the sale of its franchises with the road of the defaulting company, which requires immunity from taxation to be embraced within them. The language evidently refers to such franchises as are essential to the operation of the road sold, without which the ownership of the road would be comparatively valueless, such as the franchise to run cars, to take tolls, and the like.

But if we are mistaken in this particular, we are clear that it never was intended by the ordinance to sanction, by the sale of the franchises of a defaulting corporation, the renewal of an exemption which had once ceased to exist, and which the constitution had declared should never thereafter be created. The inhibition of the constitution applies in all its force against the renewal of an exemption equally as against its original creation; and this inhibition the legislature could not disregard in providing for the sale of the property which it had purchased.

JUDGMENT AFFIRMED.

Railway-Aid Bonds—Legislative Authority—Recitals in Bonds—Previous Election.

F. W. HUIDEKOPER v. BUCHANAN COUNTY.

United States Circuit Court, Western District of Missouri, November Term, 1873.

Before DILLON and KREKEL, JJ.

1. **Railway-Aid Bonds—Defences in Hands of Bona Fide Holders—Irregularities in Holding Election.**—Where legislative authority is conferred upon a municipal or public corporation to issue bonds on the sanction of the voters to be given at an election, and the officers of the corporation are by the law to decide whether the requisite sanction has been given, and they issue bonds which recite it, no irregularity in the manner of appointing the judges of the election, or in submitting the question, is a defence to the bonds thus issued, when in the hands of *bona fide* holders for value, without actual notice.

This is an action upon coupons to bonds issued by the county court of the county of Buchanan in payment for stock subscribed to the St. Louis and St. Joseph Railroad Company. The answer sets out all the orders of the county court, from which it appears that on the 21st day of February, 1868, the county court ordered to be submitted to a vote of the qualified voters, at an election to be held on a specified day in April, 1868, the proposition whether the county court "should subscribe for 4,000 shares of the capital stock of the St. Louis and St. Joseph Railroad Company, amounting, in the aggregate, to $400,000, upon the terms following: said subscription to be paid for in the bonds of the county at par, payable twenty years after the date of their issue," etc.

Then follow conditions that the bonds shall only issue in installments as the work on the road within the county shall progress. The county court appointed certain persons named "judges of the election to be holden on, etc., for the purpose of submitting to a vote of the taxable and qualified voters of the county the question of the subscription of $400,000 to build a railroad known as the St. Louis and St. Joseph Railroad."

The record shows that the clerk of the county court "brought into court the returns of the votes cast, certified according to law," showing "that there were cast for the subscription to the St. Louis and St. Joseph Railroad, 1,968, and against it, 520 votes."

On the 13th day of April, 1868, the county court made an order of record reciting that "whereas, it appears, to the satisfaction of the court, that two-thirds of the qualified voters of Buchanan county, at said special election held therein as aforesaid, did assent to said subscription of 4,000 shares to the capital stock of the St. Louis and St. Joseph Railroad Company; therefore, it is ordered by the court that the county court of Buchanan county subscribe for and take 4,000 shares, to be paid for according to the order of this court, made on the 21st day of February, 1868." Subsequent orders of the court recite that the subscription was made, that the company complied with the terms and conditions which would entitle it to the bonds, and that the bonds were accordingly, from time to time, executed and delivered to the company to the full amount, in all, of $400,000. The record also shows that taxes were levied to raise the means to pay the interest on these bonds from time to time, and interest ordered to be paid until January 21, 1873, when the county court directed the treasurer "not to pay the interest due on the bonds of the county issued to the St. Louis and St. Joseph Railroad Company until further orders from this court."

To this answer the plaintiff demurs.

Joseph Shippen and *T. K. Skinker*, for the plaintiff; *Ensworth* and *Young*, for the county.

DILLON, Circuit Judge.—The answer shows that there was an election held to enable the voters of the county to determine whether the county court should subscribe to the stock of the St. Louis and St. Joseph Railroad Company, and pay therefor in the negotiable bonds of the county; that more than two-thirds of the voters voting at such election were in favor of the proposition; that the county court thereupon made the subscription, and from time to time issued the bonds as the railroad company became entitled thereto by the terms of the submission. It is not denied in the answer that the plaintiff is a *bona fide* holder of the coupons in suit.

The counsel for the county contends that the bonds in question are void for three reasons:

1. That the county court had no power to appoint judges of the special election to be held on the 7th day of April, 1868, to decide upon the question of subscription, but that such power, under the act of March 21, 1868 (Laws 1868, p. 131, sec. 15), belonged to the board of registration.

2. That the question was ordered to be submitted to the "taxable and qualified voters" of the county, instead of the "qualified voters," as required by the constitution. (Art. II, sec. 14.)

3. That the submission was not an unqualified one, but contained conditions. These conditions related to the manner in which the bonds should be issued in case the proposition carried, and required work to a specified amount to be done by the company before it should become entitled to the delivery of an installment of the bonds. These conditions were in the interest of the county, and the orders of the county court show that they were complied with by the company.

It will be perceived that all of these objections relate to irregularities in the submission of the question to a vote of the people, and in the manner of appointing the judges of the election. It may be remarked that the record of the county court does not sustain the position of counsel of the county that the submission was to the "taxable and qualified voters." On the contrary, the submission was to the qualified voters. The use of the words "taxable and qualified voters" occurs in that portion of the order appointing the judges of the election, and is recitative only of the order of submission, and its mis-recital is a matter of no importance.

There is, therefore, really but one objection to the validity of these bonds left to be considered, and that is whether, if the defendant's counsel be right, that the judges of election should have been appointed by the board of registration, this is a fatal defect.

It is not necessary in this case to inquire whether, if there had been no election whatever, the bonds could have been enforced against the county, notwithstanding the constitutional provision. (Art. II, sec. 14.)

Here there was an election, and the proposition received, according to the determination of the county court entered upon its records, the assent of more than requisite two-thirds of the qualified voters of the county.

Counsel have differed as to whether the decisions of the United States Supreme Court have gone so far as to hold valid bonds issued by the municipal or public officers without any election whatever having been held, when such an election is required as a condition precedent to the exercise of the power to subscribe for stock and issue bonds to pay therefor, and we are not required to examine or discuss that question. But beyond all doubt that court has time and time again decided that no such defect or irregularity as that which is here set up is available as a defence to the *bona fide* holder of such securities. The well known doctrine of that court is that bonds, such as those here in question, are commercial paper, and when in the hands of an innocent holder no defence is available to the maker except the want of power from the legislature to issue them.

It is not needful to examine the decisions of that court upon this subject. To show, however, that the doctrines announced in the early case of The Commissioners of Knox County v. Aspinwall, 21 How. 5 ,9, and often re-affirmed, are still adhered to, we content ourselves by referring to the yet unreported cases of St. Joseph Township v. Rogers [16 Wall. 644], and Kennicott v. Wayne County [16 Wall. 644], both decided at the December term, 1872.

In the case first cited, Mr. Justice CLIFFORD, summarizing the doctrines of the court on this subject, says:

"Bonds payable to bearer, issued by a municipal corporation to aid in the construction of a railroad, if issued in pursuance of a power conferred by the legislature, are valid commercial instruments; but if issued by such a corporation which possessed no power from the legislature to grant such aid, they are invalid even in the hands of innocent holders. Such a power is frequently conferred to be exercised in a special manner, or subject to certain regulations, conditions or qualifications, but if it appears that the bonds issued show by their recitals that the power was exercised in the manner required by the legislature, and that the bonds were issued in conformity with those regulations and pursuant to those conditions and qualifications, proof that any or all of those recitals are incorrect will not constitute a defence to the corporation in a suit on the bonds or coupons if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition or qualification which it is alleged was not fulfilled."

In the case last cited (Kennicott v. Wayne County), Mr. Justice HUNT, delivering the judgment of the court, said:

"The following propositions may be considered as settled in this court:

"1. If an election or other fact is required to authorize the issue of the bonds of a municipal corporation, and if the result of that election or the existence of that fact is by law to be ascertained and declared by any judge, officer or tribunal, and that judge, officer or tribunal, on behalf of the corporation, executes or issues the bonds, with a recital that the election has been held, of that the fact exists or has taken place, this will be sufficient evidence of the fact to all *bona fide* holders of the bonds. Authorities *infra*.

"2. If there be lawful authority for the municipality to issue its bonds, the omission of formalities and ceremonies, or the existence of fraud on the part of the agents of the municipality issuing the bonds, cannot be urged against a *bona fide* holder seeking to enforce them. (Grand Chute v. Winegar, 15 Wall. 355; Commissioners of Knox County v. Aspinwall, 21 How. 539; Gelpcke v. Dubuque, 1 Wall. 203; Moran v. Miami County, 2 Black, 722.)

"3. There must, however, be an original authority by statute to the municipality to issue bonds. Municipal corporations have not the power, except through the special authority of the legislature, to issue corporate bonds which will bind their towns; neither have they the power to sell or mortgage the lands belonging to such towns, without special authority. (Marsh v. Fulton County, 10 Wall. 676.)"

To the same effect see also Grand Chute v. Winegar, 15 Wall., and the recent decision of the supreme court of the state of Missouri in Smith v. Clark County, November term, 1873.

The demurrer to the answer is sustained.

JUDGMENT ACCORDINGLY.

Does the Bankrupt Law Embrace Executors of a Deceased Person's Estate?

TURNER GRAVES *et al.* v. R. H. WINTER AND W. A. STEELE, EXECUTORS OF RICHARD WINTER, DECEASED.

In the District Court of the United States for the Southern District of Mississippi, January Term, 1874.

Before Hon. ROBERT A. HILL, District Judge.

1. **Bankruptcy—Limited Executors.**—Limited executors, appointed in pursuance of the will of a testator who was a private banker, for the purpose of winding up his banking business, cannot, in the event of such banking business becoming insolvent under their management, be proceeded against under the bankrupt law.

F. B. Pratt, Esq., for petitioners; *Messrs. Johnstons*, for defendants.

HILL, J.—The questions presented for decision arise upon defendants' motion to dismiss the petition praying to have them declared bankrupts as such executors, and the assets in their hands administered under the bankrupt law.

Several grounds, insisted upon as sustaining the motion, are stated and relied upon, only one of which need be noticed; and that is whether or not the defendants, under the powers conferred upon them, are subject to the provisions of the bankrupt act.

Richard Winter made and published his last will, which has been admitted of record, in which he devised and bequeathed to his widow, Sallie F. Winter, his estate, real and personal, and nominated her as executrix, who qualified as such. Being a private banker, he made a codicil nominating the defendants his executors for the limited purpose of winding up his banking business, and clothing them for that purpose with such powers as were necessary to carry on the business to effect that object without injury either to his estate or to those dealing with him as such banker, authorizing them to receive and pay out deposits, draw drafts and checks, collect what was due to him, and pay those to whom he was indebted as such banker. This codicil was also admitted to record, and the defendants qualified as such limited executors, and they continued the business until the panic last summer or fall, when, as is alleged, they suspended and have not resumed, failing to pay their depositors and other liabilities as bankers. It is also alleged that they have made preferred payments to different individuals.

The bankrupt act embraces individuals, co-partnerships, joint stock companies and corporations of almost every class, but does not in general, embrace trustees, such as executors, administrators and guardians, and others acting strictly in a fiduciary capacity.

This is the first case, so far as I am aware, in which executors as such have been proceeded against under our bankrupt act, either the present or former acts, or who have applied for its benefits. Under the English bankrupt law there are instances in which executors who were directed by the will of the testator to carry on trade in partnership with others, or in which a specific sum has been in the hands of the executors to be employed in trade, and was so employed, and acts were committed falling un-

der the bankrupt laws of individuals, co-partnerships or corporations, that the executors were held amenable to the bankrupt law, and the estate so employed distributed under the bankrupt law; but in all such cases the business was conducted, not for the purpose of winding up the business, but for the purpose of employing the capital for the acquisition of profits and benefit of the beneficiaries under the will.

A fair construction of the powers conferred upon the defendants under the will did not authorize them to continue the business longer than they might deem necessary to a fair liquidation and settlement of the business, and no power was intended to be conferred that did not tend to that object. The reception and use of deposits might be necessary for the purpose of paying off acceptances and other obligations for which the testator, in his capacity of banker, was liable; the drawing of drafts or checks on funds in the hands of others, due the testator as banker, might be necessary; also the drawing of such drafts or checks on such funds in favor of creditors might become the most convenient and easy mode of settling up and liquidating the debts and credits of this banking business. The banking machinery was intended only for purposes of liquidation and settlement. This was right and proper, and not inconsistent with their duties as executors under the powers conferred by the will, and though more extended than the powers usually conferred upon executors, was not inconsistent with the main object of the usual powers and duties conferred upon and intended to be attained by the appointment of and duties performed by executors.

It is insisted by petitioner's counsel that the depositors and other creditors of this banking establishment have no other sufficient remedy. In this I am of opinion there is a mistake. They are trustees, and as such are liable to be proceeded against under a creditor's bill in the chancery court of Madison county by any creditor, or if a non-resident creditor, and his demand is over five hundred dollars, in the circuit court of the United States for this district, in either of which having jurisdiction, the assets can all be marshaled and paid according to the rights of the parties, and in which every discovery may be had necessary to a full and fair collection and appropriation of the assets. This is certainly so as it relates to the banking assets and liabilities; how far the estate, in the hands of Mr. Winter, may be reached, it is not necessary now to determine.

In considering the whole case as presented by the petition and exhibits, I am satisfied that this is not one of the class of executorships designed to be administered under the bankrupt act, and therefore feel constrained to sustain the motion, and dismiss the petition at petitioner's cost.

PETITION DISMISSED.

Effect of Homestead Exemptions on Existing Debts.

JOHN C. COCHRAN, EXECUTOR, v. MICHAEL DARCY.
MICHAEL DARCY v. JOHN C. COCHRAN.

Supreme Court of South Carolina, March 12, 1874.

Hon. F. J. MOSES, Chief Justice.
" A. J. WILLARD, } Associate Justices.
" J. J. WRIGHT, }

1. **Homestead Exemption Acts—Existing Debts not Affected by**—A state constitutional ordinance and a legislative act in pursuance thereof, which create a homstead exemption, do not affect debts in existence at the time of their adoption. To give them such effect would impair the obligation of contracts.

2. **Cases Criticised.**—Gunn v. Barry, 15 Wall. 610, and Cook v. Moffat, 5 How. 308, followed. *Re* Kennedy, 2 South Car. N. S., 216, overruled.

Opinion of the court, by MOSES, Ch. J.

These cases involve the judgment of this court in *Re* Kennedy, 2 S. C. 216, and seek to reverse it under the authority of Gunn v. Barry, decided by the Supreme Court of the United States at the December term, 1873. 15 Wall. 610.

It is true, as submitted by the respondent, that in Gunn v. Barry the question directly made was as to the effect of a homestead exemption on a judgment obtained before its allowance by the constitution and act of the general assembly of the state of Georgia; still it is so apparent that, in the view of the court, the retrospective operation of such provision against all previous contracts was void, because in violation of the tenth section of the first article of the constitution of the United States, which declares "that no state shall pass any law impairing the obligation of contracts," that we feel bound to regard the opinion as expressive of the views of the court to the full extent to which the reasons which it assigns may carry it.

A respect to the duty which we owe to the highest tribunal of the country, as well as to ourselves, requires that we should not only give to the decision all proper effect in the case as presented by the facts, but that we should accept the argument of the opinion as it affects the general question involved in its judgment.

We yield a ready assent to what Mr. Justice GRIER says in Cook v. Moffat *et al.*, 5 How. 308: "The constitution of the United States is the supreme law of the land, and binds every forum, whether it derives its authority from a state or from the United States. When this court has declared state legislation to be in conflict with the constitution of the United States, and therefore void, the state tribunals are bound to conform to such decision."

The constitution of Georgia declared that each head of a family should be allowed a certain amount of realty as well as personalty, and that no court or ministerial officer should ever have jurisdiction or authority to enforce any judgment, decree or execution against such property except for taxes, and so forth. The legislature of the same state, in October, 1868, passed "An act to provide for setting apart the homestead as required by the constitution." In the cases before us the exception was claimed under the constitution and acts of the general assembly of this state, which, except as to the amount of homestead allowed and the prohibition of jurisdiction by the courts, were of the same character as those provided by the constitution and laws of Georgia. In the application of the principles which are to govern their enforcement, as proposed by the two states, no difference can be found to exist. The emphatic language of the opinion bears directly upon the general powers of the state to withdraw from a contract any substantial right which attached to at its inception, and must be viewed and accepted as the expression of the court in regard to all homestead exceptions. It is in these words: "The legal remedies for the enforcement of a contract, which belong to it at the time and place where it is made, are a part of its obligation. A state may change them, provided the change involve no impairment of a substantial right. If the provision of the constitution or the legislative act of a state fall within the category last mentioned, they are to that extent utterly void. They are, for all the purposes of the contract which they impair, as if they had never existed. The constitutional provision and statute here in question are clearly within that category and are therefore void."

The contracts on which these actions are founded were entered into before the adoption of our constitution, and we can perceive in them no element in regard to the homestead law which withdraws them from the principles announced in Gunn v. Barry.

The motions are granted and the cases remanded to the circuit court.

Correspondence—Fields' Case—Audi Alteram Partem.

MONTGOMERY, ALA., March 31, 1874.

EDITORS CENTRAL LAW JOURNAL:—Your number of the 15th of January last contains a comment upon the decision in Fields v. The State, 47 Ala. 603, which, it is believed, is not justified by the decision there made. Confident that you would not *intentionally* do an injustice, and that you will readily correct any error into which you may have fallen, if it be pointed out, I propose, with your permission, to show wherein your comment is not supported by the case criticised.

1. You say that you have read and re-read the opinion several times, and, as nearly as you can comprehend it, "it *affirms distinctly* that, in Alabama, *it is not as much of a crime* to kill a *man whose general character* for turbulence, violence and bloodshed is *bad*, as to kill one whose general character in these particulars is *good*." With all due deference it is submitted that *that* was not the decision!

It will be readily admitted by you that in construing the language of a judge, or in extracting from his opinion the legal principles controlling a decision, we must always take the expressions used in connection with the particular law and facts governing the case. It is equally well settled that the judge must enforce the law as he finds it, not as he thinks it ought to be, and that a court (in this instance one of appellate jurisdiction) is *bound* only by its ruling on points required to be decided to dispose of the case, or, if it be remanded, to guide the lower court in the further progress of the cause.

Judged by these rules, the court enunciated but two principles of law in Fields' case. The first question passed on was this: Was the general bad character of the deceased, as a violent, turbulent, bloodthirsty man, who had, but a few hours before the killing, outraged the person of his slayer, admissible and proper evidence for the consideration of the jury, under the facts in that case? The court (*for that is the effect of its judgment*) say that it was, for the reason that the jury, under the Alabama law, were vested with power not only to determine the guilt or innocence of defendant, but, if guilty, to fix the degree of his guilt and the *character*, extent and *severity* of the punishment to be inflicted, and therefore must necessarily have evidence to guide and control that discretion; and that not only the facts of the killing itself, but those immediately connected with it, and which may reasonably be supposed to have led to the killing, are proper to be considered by the jury in exercising the discretion vested in them by law.

The *second* point ruled by the court was this: The defendant having proved his character as a peaceable and law-abiding man to be good, was it proper for the court below to refuse to charge the jury that "such good character may be sufficient to create or generate a reasonable doubt of defendant's guilt, although no such doubt would have existed but for such good character"? The court ruled that the charge should have been given.

This is a fair statement of what was decided in that case, and the legal mind will see from it that nowhere did the court decide that it was not as great a crime to kill one man as another. In speaking of the discretion of the jury in assessing the punishment, PECK, Ch. J., says: "Who is prepared to say that the *punishment* should be the same where a turbulent, bloodthirsty, dangerous man, reckless of human life, has been slain—who had recently, and only a few hours before, outraged the person of his slayer—as though the party slain had been a man of good character and peaceable disposition?" He was not then speaking of the *technical magnitude* of the offence, or the technical difference between the killing of a good man or a bad man, but merely as to the *punishment*. And, as if to leave no doubt as to what reasoning the court was bound by, he continues, "for *myself*, I can not conscientiously say so" [that is, that the punishment should be the same in the cases mentioned by him]. Immediately he adds, speaking for the court, "yet *we* hold it (the evidence offered) clearly proper for the consideration of the jury in determining the *turpitude* of the crime, and what should be the measure of the punishment to be inflicted." He further adds, that although the evidence may not be sufficient to reduce the grade of the offence from murder to manslaughter in the particular case, yet it was clearly proper to enable the jury intelligently to exercise the discretion vested in them by law. See, in this connection, Flannagan v. The State, 46 Ala. 705, which you will doubtless call a more remarkable case than Fields'.

It is difficult to see from this statement how you arrived at the conclusion that either the court or the Chief Justice expressed the opinion that "it is not so much of a crime" to kill a turbulent man, etc., as to kill a good one, or as you express it in another place, "that it may not be *so heinous a crime* to kill a bad man as a good one," unless you hold that the punishment meted out, *not the act denounced by law*, makes the crime. And for this, if it be so, the court can not be held responsible. If this were so, there should be but one certain and unvarying penalty for each crime, and no power lodged anywhere to vary it according to the circumstances of the particular case. The court can not take away from the jury that discretion which permits them in the one case to hang a murderer, and in the other to imprison him for life, when both have done an act which the law denounces as murder in the first degree. Neither can court nor judge refuse to enforce the law which reduces a killing (which was murder at the common law and punishable by death) into grades of murder, allowing the jury to affix the death penalty in the one case, and to imprison for as short a term as ten years in the other.

What does the law mean when it says to a jury, you may take a murderer's life, or imprison him for life, if you find that he has committed murder in the first degree, and if you find it to be in the second degree you may imprison him as long as you please, or for as short a term as ten years? Clearly, the law "*in Alabama*" means that under some circumstances murder in the first degree *ought to be punished with more severity* than the same crime under different circumstances. It meant not only that some murders should be punished with more severity than others of the same degree of crime, but also that one class of killing denominated murder should not be as heinous an offense, nor of as high a grade, as another class of killing denominated murder. There can be but one answer when we seek the *reason* of this law, and it is this: common sense and the experience of mankind have long since taught that although two offences may be *technically the same*, yet in point of fact they differ in heinousness; that one does not deserve so severe a punishment as the other; that the *turpitude* of the one may be far blacker than that of the other; that the circumstances attending a particular case may demand for its punishment the most rigid execution of the law, while another may hardly merit the lightest punishment of the *technical grade* of crime to which the two offences equally belong. *If the crime of murder in the first degree, at least so far as punishment is considered, is always equally heinous, why should the law provide two punishments for it, one of less severity than the other?*

Speaking in a legal and technical sense, it is no "greater crime" for an able-bodied son to maliciously brain his helpless mother, or poison or starve her for the purpose of inheriting her property, than it would be for that same son, smarting under a desire for revenge, to kill one who had injured him, under circumstances constituting murder in law. For a hired nurse deliberately to drown an infant out of hatred to its parent, is murder in the first degree. For a brother deliberately to lie in wait for his sister's seducer, long after he has had cooling time, and maliciously to kill him, is also murder in the first degree. In the eye of the law the life of the mother and that of the man killed in the rencontre, the life of the murdered child and that of the seducer, are all alike equally sacred and equally protected. One has as much right, in the eye of the law, to life as the other—no more, no less. Yet who will say that, morally speaking, the assassin of his mother is not more guilty than he who kills his enemy in the rencontre? Who will deny that the one murderer ought to be visited with *severer* (human) punishment than the other? Who can conscientiously say that the slayer of his sister's seducer ought to be punished as severely or is guilty of "as heinous a crime" (as far as punishment goes) as the murderer of the helpless infant?

And yet all the cases put are equally murder in the first degree, and all, *legally* and *technically* speaking, the same crime. When, therefore, we contend that there should be less severe punishment in the case of the slayer of the seducer than of the assassin of the mother, we can not be said to hold in any legal, proper sense, that it is less "a crime," under our laws, to kill one person than another.

The law permits the good character of a defendant, especially in capital cases, to be considered by the jury in determining guilt or innocence, and even in clear cases, by the power that fixes the punishment (be it judge or jury), to determine oftentimes the extent of the punishment. Such, at least, is the principle of law in many states of the Union. Yet will any one contend that it is law in those states, because defendant can give in evidence his good character, that it is a less crime for a man of good character to violate the law than it is for a bad man to break the same law? And yet such a comment would seem to be as legitimate as the one made on the decision in Fields' case! Most assuredly, when the law gave such large discretion to the *punishing power* (the jury) it intended to afford them all proper means and evidence for the intelligent exercise of that discretion; and the court say that the character of the deceased is a fit thing to be considered by them in determining which of the several punishments allowed by law they will affix to the grade of guilt in the particular case. Besides all this, if the law permits the good character of a defendant to be given in evidence in all capital cases, even to generate a doubt of guilt, by what sound logic ought the character of the deceased to

be excluded, if the defendant wishes to introduce it, when it tends to throw any light whatever on the *circumstances*, *animus*, or situation of the parties at the time of a homicide?

I submit that the language of PECK, Ch. J., when he asks whether the *punishment* (not the crime) in the two cases put by him should be the same, is not fairly susceptible of the meaning that, *technically* and *legally* speaking, the *crime itself* is any less in the one case than the other. He does not so argue, nor does he contend that where the same circumstances occasion a homicide, the bare fact that the person slain was a bad man would reduce a killing from murder to manslaughter, etc., when, if the person slain was a good man, it would be murder. His language must be construed with reference to the statute itself, which says the circumstances of the killing (which at the common law was murder with the death penalty attached) may reduce it from murder in the first degree to murder in the second, and measurably lessen the punishment, and to those cases which from their very nature make it proper to consider the character of the deceased. The language thus construed does not militate against the admitted law as stated by you, "that all men * * stand on an equal footing in the eye of the law in respect to the right to live, * * * and that it is as much murder to kill one man as the other," be he heathen, outlaw, infidel, Indian or negro.

2. Your other criticism on the language that the circumstances attending the killing "should be viewed in connection with the good or bad character of both *defendant* and deceased" is not exactly fair, in this, that it omits to state that in the case under discussion the *defendant* had voluntarily put his character in issue and asked a charge, which was refused, as to the effect of proof of good character, and that it was in discussing this that the Chief Justice used the language quoted. Certainly where *defendant's* character is thus lawfully in issue, it is a fit matter to be considered by the jury in deciding upon his guilt and affixing the punishment. One of the first questions asked when a bloody crime is spoken of is, "what was the character of the participants?" As far as possible, juries, in deciding capital cases of this kind, should place themselves in the situation of the parties at the time of the homicide. No such question arose in the case as whether a defendant's character could be attacked by the prosecution unless the defendant first voluntarily raised the issue, and the language of the Chief Justice can not fairly be interpreted even as an intimation of opinion on that point. The law has been long settled to the contrary in Alabama. In Brown v. The State, 46 Ala. 184, PECK, Ch. J., combated the doctrine laid down in the case of Com. v. Sackett, 22 Pick. 394, holding that "it is not permissible, in a criminal prosecution, for the state to enquire into the general character of a defendant *until he has voluntarily put it in issue*, and [contrary to the Massachusetts case] that the enquiry must be confined to a time *antecedent* to the time when the offense charged is alleged to have been committed."

Knowing that your legal instincts would make you desirous of "giving the other side a hearing," I have (as you will see) rather hastily written out my views in support of what most of our Bar deem to be sound law, probably taxing your patience and columns to an unwarrantable extent.

Respectfully, THOMAS G. JONES.

Book Notice.

THE DOCTOR AND STUDENT: or, Dialogues between a Doctor of Divinity and a Student on the Laws of England. Containing the grounds of those laws, together with questions and cases concerning the equity thereof. Revised and corrected by WILLIAM MUCHALL, Gent. To which are added two pieces concerning suits in chancery by Subpena. 8vo., pp. 401. Cincinnati: R. Clarke & Co. 1874.

If we were asked to name one treatise on English law of more interest than any other in the long series that extends through the seven centuries from Glanvil to our own day, with reference to the development of that law and the history of legal doctrine, we should certainly select The Doctor and Student. Bracton is no doubt more instructive upon the origin and first forms of the common law; Coke's First Institute covers a wider field, to say nothing of Blackstone and other modern writers upon the entire system. But as marking an epoch in the life of the law, and throwing light upon the modes of thought and reasoning, upon the accepted principles and the unconscious tendencies of doctrine, no one of them seems better worth the careful study of a scientific lawyer than the modest little dialogues of St. Germain. It is no credit to our profession that it has of late years passed so completety out of use as to become one of the rarest of law books. Its title was kept familiar to the profession by two or three well-known quotations, but many of our younger members of the bar will no doubt see it for the first time in this neat edition.

The work was first printed in 1523 (not 1518, as erroneously stated in the preface), and its early repute may be judged from the fact that it went through no less than seventeen editions before the end of 1787. From that time we believe there has been but one printed in England, in 1815; and that, like the present, was a verbatim reprint from the edition "revised and corrected by William Muchall, Gent," in 1787. Muchall showed a good taste, none too common in his time, in leaving the fine old English of the author's own day unchanged (except in spelling) as he found it in the earlier editions; and to the lovers of good idiomatic sixteenth-century English this handsome reprint will have scarcely less interest than it has for the professional reader. Between the two classes of readers we may hope for a demand which at no far-off day will give us a well-edited critical edition, such as European lawyers love to bestow on their legal classics. The present notes (from Muchall's edition) are of the most trivial kind. But if some of the accomplished lawyers who are now busy with the improvement of our law by importing all kinds of novelties from other systems would spare a little time to study the history of our own, and embody the results in appropriate notes to books like this upon such topics as we have already referred to in speaking of the value of the work, they would indeed be "visiting and strengthening the roots and foundation of the science itself," in the impressive words of Lord Bacon.

So we cannot help thinking that if Lord Holt had spent the same labor in illustrating and extending the excellent sketch of the law of bailments (Dialogue second, chapter 38) that he did in importing cumbrous Latin phrases and fragments of civilian doctrine in his famous opinion in Coggs v. Bernard; and if, comparing this work with Bracton, he had shown the remarkable development of the common law on that subject, instead of going back to recast the law of his own day into the form of those sources from which Bracton borrowed—in that case our law of bailments would be far simpler, more harmonious, more logical than it is at present. Other passages to illustrate the same point may be found almost at random through the work. The discussion of a lawyer's duty in cases of doubtful morality (pp. 115–121), of the duties of executors (pp. 128–135), of the origin of uses (pp. 165–175), of the consideration of promises (pp. 174–181), of ignorance of law and fact (pp. 248–255), are exceedingly instructive and would repay careful annotation, showing by what regular and logical processes the law of our own day has for the most part been developed from purely indigenous sources. We have no space for extracts, but must quote a brief one from the chapter first above referred to, because it states in the most distinct and pithy form a doctrine to which our highest courts have but recently returned, after a long conflict and confusion of decided cases, as to the right of a carrier to limit his liability by notice or contract:

"And if [the carrier] would percase refuse to carry it, unless promise were made unto him that he shall not be charged for no misdemeanor that should be in him, the promise were *void, for it were against reason and against good manners*, and so it is in all other cases like. And all these diversities be granted by secondary conclusions derived upon the law of reason, without any statute made in that behalf. And peradventure, law and the conclusions therein be the more plain and the more open. For i any statute were made therein, I think verily more doubts and questions would arise upon the statute than doth now when they be only argued and judged after the common law." (p. 221).

Even for the mere practitioner, who cares for nothing in any book except the quotable "points" that may be used to garnish a brief, The Doctor and Student has its own value. It abounds with pithy, clear expressions of those fundamental doctrines of the common law which have been so long recognized that it is almost impossible to find a modern decision affirming them, or a modern treatise expressing them in their original form—*e. g.*, that the heir or next of kin, as such, shall have no meddling with the goods of deceased (p. 225); that the essence of a consideration lies in the charge to the promisee, not in the profit to the promisor (p. 177); that no prescription in lands maketh a right (p. 27); that no manner of chattel, neither real nor personal, shall, after the law of the realm, descend unto the heir (p. 137). True, these are mingled with a great deal of obsolete matter—questions about fines and entails, villeins and neifs, abbots and courts christian.

Mr. Muchall was careful to note all that was obsolete in his day, but we are thankful that he did not venture to omit it; for many of these passages are among the most valuable in the book to a thorough student. The work, as a whole, its purpose, method, spirit and effects, will be seen as much in these chapters as in those of modern application. The author's purpose in writing such a work is of itself a question of much interest, and worthy a careful examination. But we have already far exceeded the proper limits of a notice.

Messrs. Robert Clarke & Co. have produced the volume in a handsome dress, with clear white paper and an open, legible page. But the proof-reader has been very careless. W. E. H.

Legal News and Notes.

—THE bill for compulsory education has been defeated in the Illinois legislature, after an exciting contest.

—THE Supreme Court of the United States will hear no arguments after the 24th inst., and will adjourn for the term on the 28th of May.

—THE president has nominated William J. Wallace United States district judge for the northern district of New York, in place of the late Judge Hall.

—JUDGE CALDWELL, of the federal district court at Little Rock, has ruled that a single member of a firm who are the petitioning creditors is competent to depose to the act of bankruptcy.

—THE Supreme Court of Arkansas has recently decided, in Pinson v. State, that a suit on a bail bond is a common action to enforce a civil contract, and that the law applicable to it will not be more strictly construed than that relating to any other class of civil contracts.

—WE are greatly indebted to J. B. F. Thomas, Esq., of Boston, Mass., for a recent decision of Judge LOWELL, of the federal circuit court for Massachusetts, expounding the recent shipping law. We are also indebted to an unknown friend in New York city for a decision of Judge WOODRUFF in the federal circuit court for that district, expounding the same act. These we shall endeavor to publish next week.

—A DISPATCH from Forest City, Arkansas, states that Judge John W. Fox, judge of the eleventh judicial district, was shot, on the 22d ult., by J. R. Aldrich, a lawyer, and died in the afternoon. Judge Fox was passing along the street, when Aldrich stepped out and said, "Now, Judge Fox," and fired. Aldrich fired the second barrel after Fox had fallen. Aldrich delivered himself up to the sheriff. The origin of the difficulty is not known, though it is thought it grew out of some remarks to Aldrich by Fox while the latter was on the bench.

—THE Daily Register says of the Sanborn trial: "We cannot understand by what process of reasoning the United States district attorney in Brooklyn arrived at the conclusion that Sanborn and his assistants, acting under authority of law, could conspire together to perpetrate frauds. His Honor Judge Benedict very properly dismissed the case after it was made clear that Sanborn was acting in pursuance of an act of Congress. There never was, perhaps, a more complete failure to establish a ground whereon he prosecution could stand in court. This looks bad for the district attorney. How can he explain to the law department at Washington this attempt to hamper the operations of an officer of the general government?"

—THE will of the late Lord WESTBURY has already been before the courts three times. At present it takes the shape of an amicable suit brough before the Master of the Rolls. It is claimed that this is not done on account of any obscurity in the will, but because it is deemed best, for reasons of a private nature, that the administration of the estate should be accomplished in the Court of Chancery. Singularly enough, however, the Master of the Rolls, Sir GEORGE JESSEL, has been obliged, by a decision of Lord WESTBURY himself, to put an interpretation upon his Lordship's will which is conjectural and probably contrary to the testator's intentions. If a Lord Chancellor of England cannot make a will which shall safely pass the gauntlet of judicial interpretation, who can?

—MR. ALBERT G. BROWNE, jr., who, since the year 1867, has been the reporter of the Supreme Judicial Court of Massachusetts, has resigned his situation, and Mr. John Lathrop, of Boston, has been appointed in his stead. Mr. Browne's reports begin with the 97th volume. The 108th is published, and the 109th will soon appear. There will be five other volumes, making seventeen volumes of Browne's Reports, or from the 97th to the 114th Massachusetts Reports, inclusive. Mr. Browne has proved to be a most excellent reporter. We understand he goes on to the New York Evening Post. In the preparation of the unpublished reports he will be aided by Mr. John C. Gray, jr. Mr. Lathrop, the new reporter, is a lawyer of good repute, and withal, we learn, a fine writer.

—THE following is the order of the Supreme Court of the United States allotting the justices since the appointment of chief justice. It will be seen that the allotments remain unchanged, the chief justice being assigned to the circuit occupied by his predecessor:

There having been a chief justice of this court appointed since the commencement of this term, it is ordered that the following allottment be made of the chief justice and associate justices of said court among the circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz:

For the first circuit, Nathan Clifford, associate justice; second circuit, Ward Hunt, associate justice; third circuit, William Strong, associate justice; fourth circuit, Morrison R. Waite, chief justice; fifth circuit, Joseph P. Bradley, associate justice; sixth circuit, Noah H. Swayne, associate justice; seventh circuit, David Davis, associate justice; eighth circuit, Samuel F. Miller, associate justice; ninth circuit, Stephen J. Field, associate justice.

—UNDER existing treaties with non-Christian powers, Christian governments exercise exclusive jurisdiction over the lives and liberties of their subjects in those countries. Thus, an American who commits a breach of the peace or other offence against the law in the streets of Cairo or Pekin is arrested by the native police and taken, not before one of their own courts, but before the proper American diplomatic agent, by whom he is tried. Under treaty arrangements of this kind have come into existence what are termed "consular courts," the jurisdiction of which is quite an interesting topic of the law. It is patent at a glance that this arrangement is all one-sided, in favor of the Christian powers and their citizens or subjects residing in "infidel" or "heathen" countries. The present Khedive of Egypt ranks in progressiveness and liberality of sentiment with the most enlightened princes of Europe, and this system of consular courts in his dominions has for some time been felt to be an injustice to him. A bill has recently passed Congress authorizing the president to accept for citizens of the United States the jurisdiction of certain tribunals established or to be established under the authority of the Sublime Porte and the government of Egypt, within the dominions of the Porte and those of the Viceroy. Under the new arrangement, courts will be established composed of two subjects of the Porte and five Franks or non-Turks, the latter being nominated to the sultan by the Christian powers consenting to this arrangement. The United States will probably nominate one of these commissioners.

—THE forthcoming volume of Alabama Reports will contain a memoir of Hon. ABRAM J. WALKER, formerly a Justice of the Supreme Court of Alabama. He was born in Davidson county, Tennessee, November 24th, 1819, and was graduated from the university at Nashville ere he reached his twentieth year. After his graduation he studied law in the office of John Trimble, Esq., until the fall of 1841, when, having been admitted to the bar, he removed to Benton (now Calhoun) county, Ala., and there commenced his professional career. In 1845, without any solicitation on his part, he was nominated and elected to the house of representatives in the general assembly of the state, and in 1848 was an elector on the Cass and Butler ticket. In the exciting canvass of 1851–2 he was elected state senator from Benton county.

In 1852 he formed a law partnership with John T. Morgan, and removed to Talladega, Ala. In 1854 he was elected Chancellor of the Northern Chancery Division of that state. His career as Chancellor won for him great reputation, and as the fruits thereof he was in 1856, on the resignation of Judge Chilton, elected Justice of the Supreme Court. In 1859 he was elected Chief Justice, *vice* Judge Rice, resigned. Judge WALKER continued upon the bench by successive re-elections until July, 1868, when, his office having been vacated by operation of the reconstruction acts, he returned to the bar. He died at Montgomery, April 25, 1872, in the 53d year of his age.